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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1957

No. 283

CHOW BING KEW,
Petitioner,
vs.
UNITED STATES OF AMERICA,
Respondent.

SUPPLEMENT TO PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit.

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SUPPLEMENT TO PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit.

Petitioner asks leave to supplement his petition for writ of certiorari with the material which follows herein:

Subsequent to the docketing of the petition for certiorari in this Court, the court below on October 21, 1957, denied petitioner's motion for leave to file a second petition for rehearing in that court. The opinion filed on that motion is printed in the appendix hereof. On October 26, 1957, the clerk of that court

forwarded to this Court a copy of the supplemental transcript of record.

In denying the motion for leave to file a second petition for rehearing, the court below held that the indictment charged sufficient facts to constitute an allegation that petitioner willfully represented himself to be a citizen.

It is to be observed that this case does not turn merely upon this matter of pleading. We submit that (a) it fairly appears from the transcript that the trial court was under a misapprehension of the law throughout and applied the erroneous theory that carelessness on the part of petitioner was sufficient to constitute guilt (R. 8); (b) that the conviction could not properly be sustained by the Court of Appeals on the theory that proof of unrelated acts of petitioner could create an inference of willful conduct on the occasion charged; and (c) that the Court of Appeals is also in error in its conclusion that the indictment sufficiently charges a violation of 18 U.S.C. 911.

The Court of Appeals in its opinion of October 21, 1957 cites cases in support of the proposition that, if a necessary element of an offense can by fair construction be found within the terms of the indictment, then the indictment is immune from attack on the ground of insufficiency. We think it is clear that the indictment in the case at bar does not fall within this principle.

The Court of Appeals appears mainly to rely upon the decision of this Court in *Hagner v. United States*, 285 U.S. 429, 52 S.Ct. 417, 76 L.Ed. 861. In that case,

the indictment was laid under 18 U.S.C.A. 338, and the question was whether allegations that the defendants for the purpose of executing a scheme to defraud placed in the mails in Pennsylvania a letter to be delivered to an addressee in Washington, D. C. were sufficient to charge an offense in the District of Columbia. The court held that, while the indictment did not in set terms allege the delivery of the letter, a presumption to that effect results from the facts which were alleged, viz., that the defendants had placed the letter in a post office to be delivered to an address in the District of Columbia. That is far from holding that the word "knowingly" is the equivalent of the word "willfully" where the latter element is a necessary part of the statutory offense.

In the *Hagner* case, this Court cautioned that it was not the intent of Section 1025 of the Revised Statutes to dispense with the rule which requires that the essential elements of an offense must be alleged.

As a matter of fact, in the case of *Holsman v. United States,* 248 Fed. 193, cited by the Court of Appeals, it was observed that allegations that parties "knowingly and unlawfully" conspired to commit an offense were merely formal, and that it should appear by reasonable intendment that what they were charged with conspiring to do was done with willful intent. The decision then pointed out that facts which were there alleged necessarily imported willfulness.

Likewise, in the other cases cited by the Court of Appeals, there were specific factual allegations which by reasonable intendment constituted allegations of

willfulness on the part of the defendant. As stated by this Court in *United States v. Debrow*, 346 U.S. 374, 74 S.Ct. 113, 98 L.Ed. 92:

> "An indictment is required to set forth the elements of the offense sought to be charged."

True, the element of willfulness may be set forth either by express allegation or by facts constituting the equivalent thereof. In the indictment in the case at bar, there are no facts with regard to this particular element of the offense sought to be charged, unless it can be said that the words "knowingly" and "willfully" are synonymous and interchangeable. Since Congress has seen fit to prescribe that the statute involved can be violated only by willful conduct, we submit that the omission to charge this necessary element cannot be supplied by substitution of the word "knowingly". The cases cited at page 9 of the petition for writ of certiorari support our view that the word "knowingly" is not to be regarded as the equivalent of the word "willfully" where the latter element is a statutory ingredient of the offense sought to be charged.

In the cases cited by the Government at page 6 of its brief in opposition to the petition for a writ of certiorari, either the statute involved did not specifically require an element of willfulness or the facts were pleaded in such specific detail as to constitute the equivalent of an allegation that the conduct was willful.

In the case at bar, not only has the element of willfulness not been pleaded directly or indirectly, but

that element has been disregarded throughout the proceedings in the courts below. Confronted with the fact that the evidence was uncontradictedly to the effect that the license application was for a partnership, that petitioner's citizenship was immaterial, that the statement as to petitioner's citizenship which appeared in the document was inserted, not by him, but by a clerk in the licensing office, that petitioner was not present at that time, and that the application had never been read by petitioner, the trial court made a finding in effect that, if petitioner signed the document unread, he had been brashly careless, and from that equivocal finding, inferred his guilt. The Court of Appeals undertook to support the conviction on the basis of evidence with respect to other representations of petitioner at other times. In short, the court below appears to have indulged the inference that, on the basis of other disconnected acts of petitioner, it could be assumed that his action in this instance was willful, notwithstanding the uncontradicted evidence to the contrary.

It thus appears that in this case there was neither a proper allegation of willfulness, nor any evidence of willfulness, nor any proper finding of willfulness. The trial court in some manner persuaded itself that an inference of carelessness on the part of petitioner which could be drawn from the evidence would be enough to sustain a conviction under the statute involved. It is needless to observe that if a jury, under such an instruction of the court, had arrived at a verdict based upon any such proposition of law, the

conviction could not stand. The same result necessarily follows where the error was made by the court itself in misapplying the law in its consideration of the facts.

SUMMARY AND CONCLUSION.

As the case at bar is now presented to this Court, it is clear that:

1. The indictment charging the petitioner contained no facts alleging he made the statement "willfully". The Court of Appeals says this omission can be supplied *inferentially* from the use of the word "knowingly".

2. Upon the trial there was no evidence whatever that the petitioner made the statement at all, let alone that he made the statement "willfully." Defendant could not have made the statement at all if he did not supply the information for the form and did not read it, and the evidence was uncontradicted on these matters. The Court of Appeals says this omission can be supplied *inferentially* from evidence that, in completely unrelated instances, petitioner has claimed United States citizenship on other occasions.

3. The trial court made a specific finding (R. 8) to the effect that claimed ignorance (of the making of the statement by petitioner) does not relieve him of criminal responsibility. "On the contrary, his brash carelessness, if such be the case, emphasizes his criminality."

Counsel for petitioner believe that these findings can only mean that the trial court believed that "brash carelessness" was sufficient to replace "willfulness" as an essential component of the crime and that petitioner's ignorance of the statement in the application meant nothing in view of his "brash carelessness".

The Court of Appeals says this was remedied by the finding in the judgment and commitment that:

> "The defendant at Stockton, California did knowingly and unlawfully falsely represent himself to be a citizen of the United States without having been naturalized or admitted to citizenship, or otherwise being a citizen of the United States."

Here again, there is no finding of willfulness, and as pointed out at page 8 of the petition for writ of certiorari, this was not intended as a finding but was a mere formal recital (at the time of imposing sentence) of the steps previously taken by the court and was couched in the language of the indictment.

We earnestly contend that this Court should not allow a conviction to stand where the most essential ingredient of the crime has been omitted from (1) the indictment, (2) the trial, (3) the findings, (4) the law as applied by both the trial court and the Court of Appeals.

We earnestly contend that those essential ingredients cannot be supplied by inference upon inference derived from other unrelated acts of petitioner, all of which omissions by the trial court and Court of

Appeals are contrary to the law as settled by this Court in decisions cited in the petition for writ of certiorari.

We believe that the decision of the Court of Appeals is in conflict with applicable decisions of this Court, for the reasons heretofore set forth; that the Court of Appeals in this case has so far departed from the accepted and usual course of judicial proceedings and has so far sanctioned such a departure by the trial court as to call for an exercise of this Court's supervision; and that the Court of Appeals in its decision has also decided an important question of federal law which has not been, but should be, settled by this Court.

We therefore respectfully pray that the petition for a writ of certiorari be granted.

Dated, San Francisco, California,
November 12, 1957.

ARCHIBALD M. MULL, JR.,
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Counsel for Petitioner.

ARTHUR J. PHELAN,
Of Counsel.

(Appendix Follows.)

Appendix

United States Court of Appeals
for the Ninth Circuit

CHOW BING KEW, *Appellant,* vs. UNITED STATES OF AMERICA, *Appellee.*	No. 15,251 Oct. 21, 1957

Denial of Leave to File Second Petition for Rehearing.

Before: DENMAN, BONE and FEE, Circuit Judges

DENMAN, Circuit Judge:

Chow Bing Kew, hereafter Chow, now seeks leave to file a second petition for rehearing on the contention that the first count of the indictment fails to charge a crime in violation of 18 U.S.C.A. §911 and hence, he contends, the court lacks jurisdiction to consider it.[1] That count states:

> "Count One: That CHOW BING KEW, alias SAM WAHYOU, alias DONALD HAROLD WAHYOU, (hereinafter called "said defendant"), heretofore, to-wit: On or about January 18, 1952, at Stockton, County of San Joaquin,

[1]This is although the contention was not contained in his statement of points to be considered on appeal, nor in his briefs, nor in the hearing, nor in its petition for rehearing.

State and Northern Division of the Northern District of California, and within the jurisdiction of this Court, then and there being, did knowingly, and unlawfully falsely represent himself to be a citizen of the United States without having been naturalized or admitted to citizenship, or without otherwise being a citizen of the United States (18 U.S.C.A. 911)."

Chow's contention is that this count of the indictment fails to use the word "wilfully" and hence fails to state the crime under 18 U.S.C. §911 which provides that:

"Whoever falsely and willfully represents himself to be a citizen of the United States shall be fined not more than $1,000 or imprisoned not more than three years, or both."

Concerning the word "wilful" in a criminal statute the Supreme Court states in Screws v. United States, 325 U.S. 91 at page 101:

"We recently pointed out that 'willful' is a word 'of many meanings, its construction often being influenced by its context.' Spies v. United States, 317 U.S. 492, 497. At times, as the Court held in United States v. Murdock, 290 U.S. 389, 394, the word denotes an act which is intentional rather than accidental. And see United States v. Illinois Central R. Co., 303 U.S. 239. But 'when used in a *criminal statute it generally means an act done with a bad purpose.*' Id., p. 394. And see Felton v. United States, 96 U.S. 699; Potter v. United States, 155 U.S. 438; Spurr v. United States, 174 U.S. 728; Hargrove v. United States, 67 F.2d 820. In that event something more is

> required than the doing of the act proscribed by the statute. Cf. United States v. Balint, 258 U.S. 250. An evil motive to accomplish that which the statute condemns becomes a constituent element of the crime. Spurr v. United States, supra, p. 734; United States v. Murdock, supra, p. 395." [Emphasis added.]

The word "wilful" in the statute need not be repeated in the indictment, at least if the question is not raised in the court below or on appeal, if the "necessary facts" showing the "bad purpose" of the accused's conduct "appear in any form, or by fair construction can be found within the terms of the indictment." Hagner v. United States, 285 U.S. 429, 433 (1932). See also, Kramer v. United States, 166 F. 2d 515 (9th Circ.).

We think that by "fair construction" of the words of the indictment—that the accused "did knowingly and unlawfully falsely represent himself"—they clearly mean that he acted "wilfully" in making his false statement that he is a citizen of the United States.

This question has been considered by us repeatedly. In Nickell v. United States, 161 Fed. 702 (9th Circ.), cert. denied 214 U.S. 517,[2] it was contended that the indictment failed to charge that the following acts were done wilfully as required by the statute:

> "When, in truth and in fact, as each of the said persons would then well know, and as they,

[2] So also in Holsman v. United States, 248 Fed. 193, 195 (Cir. 9); Cf. Johnston v. United States, 145 F.2d 137, 138 (Cir. 9).

the said Henry W. Miller, Frank E. Kincart, Martin G. Hoge, and Charles Nickell, would then well know, such persons would be applying to purchase such lands on speculation, and not in good faith to appropriate such lands to their own exclusive use and benefit, respectively, and would have made agreements and contracts with other persons by which the titles which they should acquire from the said United States in such lands would inure to the benefit of persons except themselves."

This court held:

"If the defendants knew that these affidavits would be false, and knew that the entrymen would have made contracts for the conveyance of the lands to be acquired by them, and having this knowledge nevertheless procured the making of them, there can be but one conclusion, and that is that they wilfully, which is but another name for intentionally, entered into the conspiracy charged. While matters of substance are as essential now as before the passage of the statute, and of necessity must always remain so, we take it that its enactment was intended to have substantially the same effect as those of many of the states, which provide that an indictment which will enable a person of common understanding to know what is intended is sufficient.

"In Van Gesner v. United States, 153 Fed. 54, 82 C.C.A. 188, it was observed by this court:

'When the facts alleged necessarily import such willfulness, the failure to use the word itself is not fatal. Such failure, under such circumstances, would not be fatal even at common law.'"

Chow contends that the Fifth Circuit has held otherwise in Pullen v. United States, 164 F.2d 756. A charge was brought under a statute (then 18 U.S.C. Sec. 52) making it an offense for any person, under color of law, wilfully to subject any person to the deprivation of any constitutional rights. The indictment charged only that the defendants, law officers, "did subject" a person to the deprivation of the right to be secure in his person. There was no allegation as in the instant case, relating to the intent or mental state of the defendants or from which it could be determined that the defendants' acts were knowing, unlawful, deliberate, or other than inadvertent.

Chow also cites as a general rule the following from Marteney v. United States, 218 F.2d 258, 261:

> "When 'wilfulness' is made an essential element of an offense, as it is in this case, it is a general rule that a failure to allege wilfullness is fatal to the indictment."

In so doing he conspicuously omits the next cited opinion on which the court relies, namely, Hagner v. United States, 285 U.S. 485, considered supra, stating that allegations which are the equivalent of "willfulness" are sufficient.

Chow further contends that the indictment is fatally defective in failing to state the person to whom the false claim to citizenship was made, citing two district court cases decided before 18 U.S.C.A. §911 was amended to the present form. It then read:

> "Whoever, for any fraudulent purpose whatever, shall falsely represent himself to be a citi-

zen of the United States, without having been duly admitted to citizenship, shall be fined not more than $1,000, or imprisoned not more than two years, or both."

The two cases, United States v. Weber, 71 F. Supp. 88, 91 and United States v. Raymond, 37 Fed. Supp. 957 are based on the theory that because a statement defrauding some one is involved the person defrauded by believing the statement should be named. Since the element of fraud is not in the amended statute controlling here, there is no merit to the contention.

The motion for leave to file a second petition for rehearing is denied.

(Endorsed:) Opinion on petition for leave to file second petition for rehearing. Filed Oct. 21, 1957.

Paul P. O'Brien, Clerk.